

IN THE SUPREME COURT OF MISSOURI

NO. SC95369

TIMOTHY S. PESTKA and RUDY M. CHAVEZ,

Appellants-Plaintiffs,

v.

THE STATE OF MISSOURI, and THE DIVISION OF EMPLOYMENT SECURITY
and KEN JACOBS in his official capacity as Acting Director of said Division,

Respondents- Defendants.

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

CAUSE No. 15AC-CC00438

JUDGMENT DATED NOVEMBER 12, 2015

HONORABLE JON E. BEETEM

CIRCUIT COURT JUDGE

APPELLANTS' SUPPLEMENTAL BRIEF

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SUPPLEMENTAL ARGUMENT

Pursuant to this Court’s February 1, 2016 Order directing additional briefing, Appellants present this Supplemental Brief.

1. Is a veto message a “bill” for purposes of article III, section 20(a)?

A vetoed bill is considered a “bill” for purposes of Article III, § 20(a). Therefore, a vetoed bill is subject to tabling pursuant to Article III, § 20(a). The governor’s veto message itself would not be considered a “bill,” however. See Article III, § 21 (“Bills may originate in either house and may be amended or rejected by the other.”). However, after a bill is vetoed by the governor, that bill retains its status as a “bill” for purposes of Article III, § 20(a).

2. If it is a “bill,” then pursuant to article III, section 20(a), for it to have been tabled is it necessary for the reconsideration of HB150 to appear on a Senate calendar in the Senate Journal on the first Friday following the second Monday in May?

Under Article III, § 20(a), “[a]ll bills in either house remaining on the calendar after 6:00 p.m. on the first Friday following the second Monday in May are tabled.” Thus, Article III, § 20(a) tables bills “remaining on the calendar.” The Senate Formal Calendar for May 12, 2015 notes that the House had overridden the governor’s veto of HB 150.¹

¹ The Senate Formal Calendar for May 12, 2015 can be found on the Senate website at http://www.senate.mo.gov/15info/BTS_Web/Daily.aspx?SessionType=R&actionDate=5/12/2015.

However, the Senate Formal Calendar for the final day of the regular legislative session, May 15, 2015, does not contain any reference to HB 150.²

HB 150 was nonetheless tabled at the end of the regular legislative session. The term “calendar” as used in Article III, § 20(a) must mean something broader than the Senate Formal Calendar. An example clarifies this point. In 2015, there were 568 Senate bills and 1,360 House bills. Some of these bills were never sent to committee, some died in committee, and some were voted out of committee but were never considered by the full House or Senate. Despite the fact that 568 Senate bills were filed in 2015, the Senate Formal Calendar for May 15, 2015 lists only 28 Senate bills. The bills which had not been enacted before the end of the 2015 general legislative session were undoubtedly tabled at the end of the session—despite the fact that they were not included on the Senate Formal Calendar at the end of session. Therefore, “remaining on the calendar” for purposes of Article III, § 20(a) includes any bill which was not passed during the general legislative session, regardless of whether that bill was listed on the Senate Formal Calendar.

Any other interpretation would be contrary to the practice of the General Assembly. As such, the Senate cannot avoid the clear constitutional mandate that bills be tabled at the end of session by simply failing to list HB 150 on its Formal Calendar. If that was the case, unperfected bills would roll over from year to year in perpetuity, frustrating the clear

² The Senate Formal Calendar for May 15, 2015 can be found on the Senate website at http://www.senate.mo.gov/15info/BTS_Web/Daily.aspx?SessionType=R&actionDate=5/15/2015

requirement that bills which were not enacted by the end of the regular legislative session be tabled.

The House properly voted to override the veto of HB 150 prior to the end of the regular legislative session. As such, HB 150 was immediately transferred to the Senate for reconsideration pursuant to Article III, § 32. The Senate failed to act during the regular legislative session, thus HB 150 was tabled pursuant to Article III, § 20(a). The Senate made no further attempts to remove HB 150 from the table. Moreover, HB 150 was not subject to a “late” veto for purposes of Article III, § 32 which would allow it to be considered during the veto session. Therefore, the Senate’s reconsideration and override of the tabled HB 150 during the veto session was unconstitutional.

2a. Article III, section 32 provides that, once the first house has overridden a veto, “the presiding officer of that house shall ... send the bill with the objections of the governor to the other house, in which like proceedings shall be had in relation thereto.” What does the phrase “like proceedings” refer to, and what language in this provision (or elsewhere in section 32) allows the second or receiving house to alter those “proceedings” or the effect of article III, section 20(a) by refusing to promptly read in the message from the first or originating house?

After the originating house overrides a veto, the bill is sent to the receiving house for “like proceedings.” The term “like proceedings” requires the receiving house to reconsider the vetoed bill in the same manner as the originating house had considered it. In other words, the receiving house must enter the governor’s objection into its journal,

consider the question described in Article III, § 32, and conduct a vote on whether to override the veto.

However, merely mirroring a vote is not enough for the proceedings in the receiving house to be “like” for purposes of Article III, § 32. Indeed, “like proceedings” must also be conducted during the same legislative session—i.e., both proceedings must occur in the regular session or in the veto session. Without this key temporal component, the proceedings cannot be considered “like proceedings” under Article III, § 32. Any other interpretation of “like proceedings” would allow one house to revisit vetoed bills from any session of any General Assembly since Governor Nixon assumed office in 2009.

The House entered the governor’s objection into its journal and overrode the veto on May 12, 2015. Despite having time to do so,³ the Senate took neither of the steps

³ The General Assembly controlled the timing in which it presented HB 150 to the governor. By presenting HB 150 to the governor relatively early during the regular legislative session, the governor had only 15 days to issue a veto. Article III, § 31. If the General Assembly had waited and initially passed HB 150 near the end of session, the governor would have had 45 days to issue a veto. Id. This tactical choice taken by the General Assembly ultimately shortened the period in which the governor could veto HB 150. By making this choice, the General Assembly took the risk of not being able to timely override the veto before the end of the regular legislative session and likewise not having a veto session to fall back upon. This is exactly what happened here. The General Assembly must be held accountable for the tactical decisions it made during session.

required before the end of the regular legislative session to ensure “like proceedings” under Article III, § 32. The Senate failed to vote to override the veto prior to the end of the regular legislative session on May 15, 2015. Moreover, it failed to enter the governor’s objection into its journal before the end of the regular legislative session. Indeed, the last entry of the Senate Journal prior to adjournment, May 13, 2015, does not mention HB 150.⁴ Therefore, the Senate’s override during the veto session is not a “like proceeding” and HB 150 was enacted unconstitutionally.

It is noteworthy that the “like proceedings” requirement is entirely separate from the parties’ conflicting interpretations of the phrase “bills returned by the governor.” Thus, even if this Court accepts Respondents’ definition of “bills returned by the governor,” Appellants must nonetheless prevail under the “like proceedings” requirement. In other words, even if bills which were not subject to a “late” veto can be considered during a veto session, Article III, § 32’s “like proceedings” requirement requires that both houses of the General Assembly act during the same session, not one vote during the regular session and

⁴ The Senate Journal’s first entry after adjournment, May 27, 2015, explicitly mentions that the House had overridden the veto of HB 150. In addition to violating Article III, § 32, the Senate’s actions also conflict with other constitutional requirements to keep an accurate journal. See Article I, § 5 (“Each house shall keep a journal of its proceedings, and from time to time publish the same...”); Article III, § 36 (“Each house shall publish a journal of its proceedings.”).

another during the veto session. Because the House acted in the regular legislative session and the Senate acted in the veto session, Article III, § 32's "like proceedings" requirement was not met and HB 150 was enacted unconstitutionally.

The requirement of "like proceedings" is also independent of whether HB 150 was tabled under Article III, § 20(a). For the reasons explained above, HB 150 was tabled at the end of the regular legislative session. The "like proceedings" requirement cannot be met where the House overrode the veto of HB 150 but the bill was tabled in the Senate. But even assuming arguendo that HB 150 was never tabled, the "like proceedings" requirement of Article III, § 32 nevertheless is not met because the House and Senate acted in different legislative sessions. Thus, the Senate improperly overrode the veto of HB 150 during the veto session after the House overrode the veto during the regular session.

3. What action, if any, did the House or Senate have to take to remove HB150 from the table and place it before the Senate so as to enable the Senate to reconsider the bill in the September veto session?

HB 150 was tabled in the Senate at the end of the regular legislative session pursuant to Article III, § 20(a). However, for the reasons explained below, neither the House nor the Senate could have taken any steps to remove HB 150 from the table so that it could be considered in the September veto session.

Both the House and the Senate have rules which permit them to revive a tabled bill under certain circumstances. During session, the Senate may revive a bill with a two-thirds majority vote. See Senate Rule 75. The House can likewise revive a bill during session with a two-thirds majority vote, so long as the vote takes place within ten days of the bill

being tabled. See House Rules 46, 80. However, neither Senate Rule 75 nor House Rule 80 were available to remove HB 150 from the table. Indeed, the Constitution tables bills at the end of the regular legislative session. Article III, § 20(a). As such, it is impossible to revive a bill under Senate Rule 75 or House Rule 80 after the regular session has ended. In any event, it is undisputed that the Senate never voted to remove HB 150 from the table under Senate Rule 75.

While the General Assembly was unable to remove HB 150 from the table after the end of the regular legislative session, it was able to consider an entirely new but identical bill. Article III, § 20(b) permits the General Assembly to call a special session by submitting a petition to the Secretary of State which (1) states the purpose of the special session and (2) is signed by three-fourths of the House and Senate. Thus, a special session could have been called to consider legislation identical to a tabled bill which had been vetoed by the governor. But this special session would not be considered a reconsideration of a vetoed bill. Instead, it is an entirely new bill which must go through all of the steps required for enactment during the special session. Aside from these issues, it is further undisputed that the General Assembly never voted to call a special session to consider HB 150.

But even if the Senate was somehow able to remove HB 150 from the table after the end of the regular legislative session, it was nonetheless improper to consider HB 150 during the September 2015 veto session. For the reasons stated in Appellants' principal brief, only bills subject to a "late veto" may be considered during a veto session. Article III, § 32. In other words, Article III, § 32 prevents bills from being tabled pursuant to

Article III, § 20(b) so that they may be considered during a veto session.⁵ Because the veto of HB 150 was not a “late veto,” the Senate could not have taken any action to properly consider it during the September 2015 veto session.

Finally, and in the alternative, the Senate’s consideration of HB 150 during the September 2015 veto session was improper for another independent reason. As noted above, because the House overrode the veto during the regular legislative session, the Senate’s attempt to override the veto during the veto session violated the “like proceedings” requirement of Article III, § 32.

CONCLUSION

HB 150 reduces the maximum unemployment benefits from 20 weeks to a minimum of thirteen weeks. For many Missourians, seven weeks of benefits can mean the difference between keeping their homes and foreclosure. Regardless of the substantive merits of this legislation, the Missouri Senate’s override of the veto of HB 150 was untimely. As such, the passage of HB 150 is unconstitutional.

⁵ Respondents’ interpretation—that any vetoed bill may be considered during a veto session—would eviscerate the tabling requirement of Article III, § 20(a).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies this Brief contains the information required by Rule 55.03 including maintenance of a signed original, and otherwise complies with the limitations in Rule 84.06(b) and contains 2,515 words and 277 lines, exclusive of the material identified in Rule 84.06(b), as determined using the word count program in Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2016, the foregoing was filed with the Clerk of the Court, to be served by operation of the Court's electronic filing system upon: Jeremiah J. Morgan, Deputy Solicitor General, Supreme Court Building, P.O. Box 899, Jefferson City, MO 65102. A signed original is also maintained in the files of the certifier below.

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